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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2024-001738
Opinion No. 6081, filed August 7, 2024

Maybank 2754, LLC.....Respondent,

Versus

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.....Petitioners.

RETURN TO PETITIONS FOR WRIT OF CERTORARI

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COUNTER STATEMENT OF THE CASE

NOW INTO COURT, comes the Respondent Maybank 2754, LLC (herein “Maybank”), who submits the following RETURN to the Joint Petition for Writ of Certiorari by Petitioners Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC (herein “Beach Fenwick”); the Beach Company [sic]¹; and Penny Creek Associates, LLC (herein “PCA”); and RETURN to the Petitioner Seamon, Whiteside & Associates, Inc.’s Petition for Writ of Certiorari, pursuant to Rule 242(f), SCACR. As an initial matter, Petitioner Seamon, Whiteside & Associates, Inc. (herein “SWA”), has fully incorporated and adopted all arguments furthered by the Joint Petitioners. Therefore, the Respondent’s Return shall incorporate and adopt all arguments as to all Petitioners in this matter, although the individual sections, below, are addressed pursuant to the designations in the respective Petitions. The Respondent fully incorporates all legal and factual arguments, legal principles and legal authorities previously cited in the Respondent’s Final and Reply Briefs to the Court of Appeals into this Return, and urges this Honorable Court to deny both Petitions for Writ of Certiorari filed by the Joint Petitioners and SWA.

This matter was commenced in the Charleston County Court of Common Pleas by the Respondent, Maybank, a limited liability company organized and existing under the laws of the State of South Carolina, filing an action on January 13, 2020, against multiple defendants named herein as Petitioners, seeking various points of relief related to the Respondent’s assertion of the existence of a thirty (30) foot easement in favor of the Respondent on land owned by Petitioner, Beach Fenwick, pursuant to the conveyance of title to same – “Property”. (R. Vol. I pp. 475-490.) The Complaint was verified by Michel F. Laplante, who serves as Manager of Maybank. (R. Vol.

¹ Beach Fenwick LLC and the Beach Company are collectively referred to herein as the “Beach Entities”.

I p. 488.) The adjacent lot owned by the Respondent has a building situated thereon with office spaces for lease. During all material times, office space on the Respondent's lot has been leased and was being leased as of the date of the filing of the Complaint. Until on or about October 4, 2013, Petitioner PCA solely owned Maybank and was the sole member of Maybank. Eugene Zurlo, identified as a Petitioner in this matter individually and as a co-trustee of the Eugene J. Zurlo Living Trust dated December 11, 1997, was a member of PCA at all relevant times and was a member at the time of the filing of the Complaint. The Eugene J. Zurlo Living Trust is, upon the information and belief, the sole member of Petitioner 1776, LLC, with Eugene Zurlo and his Wife serving as co-trustees.

On October 4, 2013, Petitioner Zurlo executed that certain Resolution of the Sole Shareholder of Penny Creek Associates, LLC (herein "Resolution") – a true and correct copy of the Resolution is attached to the Complaint and incorporated therein as an exhibit by the Respondent. (R. Vol. I pp. 489-490.) Pursuant to the Resolution, PCA approved the transfer of its membership interest in Maybank to individuals set forth therein – members of the Laplante Family – and also agreed to grant to them, and their assigns, a thirty (30) foot private right of way access easement for pedestrian and vehicular ingress, egress and access to, from and over the Property, the location and condition of which to be mutually agreed upon at the completion of that certain roadway known as Pitchfork Road. (R. Vol. I pp. 489-490.) Pursuant to the Resolution, upon completion of Pitchfork Road, an easement agreement to memorialize the thirty (30) foot private right of way easement would follow. Respondent claims an easement by virtue of the Resolution, the Contract for Assignment of Interest (herein "Contract for Assignment"), and the Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (herein "Assignment"). (R. Vol. IV pp. 1806-1821.) As of the

date of the filing of the Complaint, Pitchfork Road had not been completed, and the Resolution was not recorded. Maybank was assigned rights to the thirty (30) foot private right of way easement. (R. Vol. I pp. 489-490.)

As the Respondent describes in the Complaint, Mr. Zurlo has a contentious history with certain members of the Laplante Family. On December 16, 2013, a little over two (2) months after Zurlo executed the Resolution, Zurlo and others commenced a derivative and judicial dissolution action against PCA and others in Charleston County Court of Common Pleas under case # 2013-CP-10-07280. (R. Vol. I pp. 216-302.) On August 14, 2014, approximately ten (10) months after Zurlo executed the Resolution, a foreclosure action, the Property being a subject thereof, was commenced against PCA and others by Wells Fargo Bank, N.A., in Charleston County Court of Common Pleas Case # 2014-CP-10-4946. (R. Vol. I pp. 303-474.) Thereafter, on or about February 29, 2016, the derivative and judicial dissolution action was settled on the record before the Court. Upon information and belief, on May 19, 2016, as part of the settlement of the derivative and judicial dissolution action, PCA executed and delivered a promissory note to The Eugene J. Zurlo Living Trust dated December 11, 1997, and secured it with a second mortgage on the Property. On April 7, 2017, articles of organization of 1776 were filed with the South Carolina Secretary of State. On the same day that 1776 was created, April 7, 2017, The Eugene J. Zurlo Living Trust dated December 11, 1997, also assigned the Zurlo Note and Mortgage to 1776. Upon information and belief, around the time of the creation of 1776, the Zurlo Note and Mortgage went into default. The sole member of 1776 is the Eugene J. Zurlo Living Trust dated December 11, 1997, as evidenced by that certain Development Agreement between 1776 and the City of Charleston. (R. Vol. 3 pp. 15.) 1776 intervened in the above-referenced foreclosure action and received a credit bid based on the indebtedness owed on the Zurlo Note and Mortgage.

Subsequently, 1776 was the winning bidder at the foreclosure sale and consequently received title to the Property by virtue of a Master's deed.

During the pendency of the above-referenced derivative and judicial dissolution and foreclosure action, the Property was in the process of being developed while it was still owned by PCA, and Petitioner SWA was hired by PCA to prepare planned unit development guidelines for the Property that were submitted to the City of Charleston for approval. Upon information and belief, as a direct result of its involvement with the development process and in working with PCA, and later also with 1776 and Zurlo for the development of the Property, SWA acquired actual knowledge of the thirty (30) foot private right of way easement. (R. Vol. I p. 481.) Upon information and belief, sometime after 1776's acquisition of the Property, Beach Company became involved with and assisted with, the development of the Property. The Respondent asserts in its verified complaint that as a direct result of its involvement with the development process and working with 1776 and Zurlo for the development of the Property, Beach Company acquired actual knowledge of the thirty (30) foot private right of way easement. (R. Vol. I p. 481.) Subsequently, on November 27, 2019, 1776 entered into a certain development agreement with the City of Charleston to develop the Property, which was recorded with the Register of Deeds in Charleston County, South Carolina on December 2, 2019. (R. Vol. III. p. 933.) On that same day, December 2, 2019, Beach Company and SWA attended a Design Review Board meeting at which Laplante discussed the easement being omitted from the development plans, and then later discussed the easement with them immediately after the meeting. (R. Vol. 5 p. 1950.) Then, on December 12, 2019, 1776 transferred the Property to Beach Fenwick by virtue of a deed recorded with the Register of Deeds of Charleston County, South Carolina. (R. Vol. 3 p. 1064.)

The owner of the Property at the start of this litigation was Petitioner Beach Fenwick, and

upon information and belief of Respondent is an affiliate and/or subsidiary of Beach Company, sharing some of the same officers, directors and/or employees who had actual knowledge of the thirty (30) foot private right of way easement, and otherwise had actual knowledge of the thirty (30) foot private right of way easement before it acquired title to the Property. Beach Company is listed as Beach Fenwick's manager as set forth in Beach Fenwick's articles of organization, which were filed with the South Carolina Secretary of State on December 3, 2019. (R. Vol. 3. p. 1378). Also, on December 12, 2019, 1776 partially assigned its rights and obligations of the above-referenced development agreement to Beach Fenwick except for its obligations "with respect to the contribution of land for Northern Pitchfork Road...." pursuant to that certain partial assignment and assumption of rights and obligations under development agreement recorded with the Register of Deeds of Charleston County, South Carolina. (R. Vol 3. p. 1071). Upon information and belief of the Respondent, the development plans for the Property do not have any specific provisions or reservations for the thirty (30) foot private right of way easement upon the completion of Pitchfork Road.

The Respondent alleges multiple causes of action against the Petitioners: Conspiracy leading to a demand for a declaratory judgment that an easement exists in favor of the Respondent; that the Resolution as described above establishes that a restrictive covenant exists that runs with the land, which covenant touches and concerns the land and specifically identifies the easement; that there exists a civil conspiracy committed by the Petitioners due to the fact that all Defendants had actual knowledge of the easement and they purposely concealed such from any recorded documents and their representations and submissions to the City of Charleston to obtain development approval of the Property causing damages to the Respondent; that the Respondent is entitled to a temporary injunction restraining the Petitioners Zurlo, 1776 and Beach Fenwick from

developing the Property to preserve the status quo until after a trial on the merits and a judgment is rendered and alleging irreparable harm if the injunction is not granted; and the Respondent specifically requested a jury trial on all issues triable by jury. (R. Vol. I pp. 475-490.) The Answer of the Beach Entities is curious on the issue of actual knowledge of the easement – they allege that they deny so much thereof as alleges or may be construed to allege that there exists any valid legitimate or enforceable easement, as alleged by Respondent, in or upon the Property and thus also deny Beach Co. could have had any actual notice thereof. (R. Vol II p. 496, paragraph 32; p. 497, paragraphs 35 and 39; p. 498, paragraphs 40, 41 and 45; p. 499, paragraph 45; p. 500, paragraph 57; p. 501, paragraph 57; p. 510, paragraph 32; p. 511, paragraphs 35 and 39; p. 512, paragraphs 39, 40, 41 and 45; p. 513, paragraph 45; p. 514, paragraph 57; p. 515, paragraph 57.)

On or about June 16 and 25, 2020, the parties appeared before the Honorable Bentley D. Price pursuant to certain motions filed by the Petitioners and a motion filed on behalf of the Respondent, in the following particulars: Beach Fenwick and The Beach Co.’s motion to dismiss; Beach Entities’ Motion to Refer to the Master-In-Equity; SWA’s motion to dismiss civil conspiracy; 1776, LLC’s motion to dismiss; 1776’s motion to refer to the Master-In-Equity; Eugene J. Zurlo, individually and as co-trustee of Eugene J. Zurlo Living Trust’s motion to refer to the Master-In-Equity; and the Respondent Maybank’s motion for temporary injunction. (R. Vol I pp. 179-184; R. Vol II pp. 532-533; pp. 534-580; pp. 581-591; pp. 592-593; p. 594; pp. 595-613; pp. 614-615.) On June 30, 2020, Judge Price issued a Form 4 Order finding that “Respondent Maybank 2754 LLC’s Motion/Temporary Injunction is denied. Defendant Beach Company’s Motion to Dismiss and Refer to the Master, along with all outstanding motion to refer to the master, are granted.” (R. Vol. I pp. 176-178.) On July 7, 2020, the Respondent filed a Motion for Reconsideration of the Court’s Order Entered on June 30, 2020 and request for Expedited Ruling.

(R. Vol. II pp. 690-703.) On July 8, 2020, the Petitioners collectively represented by Eugene J. Zurlo individually and as co-trustee of the Eugene J. Zurlo living trust dated December 11, 1997, filed a Joint Response to the Respondent's Motion for Reconsideration in which they asserted that the matter was correctly transferred to the Master-in-Equity. (R. Vol. II pp. 704-705.) On July 13, 2020, Judge Price issued a more detailed order further elaborating on the trial court's ruling denying the temporary injunction request by Respondent and granting the relief sought by the Petitioners, which was transfer of this matter to the Master-in-Equity. (R. Vol. I pp. 179-184.) Specifically, Judge Price ordered that the "entire case and all the pending Motions are referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53. All pre-trial matters, including the parties' motions shall be and are hereby referred to the Master-in-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court." (R. Vol. I pp. 179-184.) The Respondent filed and served a timely Notice of Appeal of Judge Price's June 20, 2020 and July 13, 2020 orders, on July 15, 2020. (R. Vol. V pp. 1931-1942.) On August 14, 2020, the Eugene J. Zurlo defendants filed a Motion and Memorandum in Support of Summary Judgment, and subsequently on September 14, 2020 filed a Supplemental Memorandum in Support of Motion for Summary Judgment. (R. Vol. II pp. 740-922.) On August 18, 2020, while the first appeal filed by Respondents was pending the Master-in-Equity filed an order transferring this matter back to the Circuit Court, and purported to moot the appeal filed by Respondent. (R. Vol. I pp. 185-187.) Subsequently, Beach Fenwick and the Beach Company filed a Motion for Summary Judgment on August 19, 2020 and a Memorandum of Law in Support of Motion for Summary Judgment on September 18, 2020. (R. Vol. III pp. 923-925; pp. 1442-1484.) On August 26, 2020, Petitioner, SWA filed a Supplement to Motion to Dismiss and/or Motion for Summary Judgment. (R. Vol. III pp. 1347-1348.) On

September 3, 2020, the Petitioner 1776, LLC filed a Notice and Motion for Summary Judgment and a Memorandum of Law in Support of Summary Judgment on September 21, 2020. (R. Vol. III pp. 1349; Vol. IV pp. 1485-1489.) Subsequently, on or about September 15, 2020, all of the Petitioners filed in the Court of Appeals a joint Motion to Dismiss Appeal and for Costs and Memorandum in Support Thereof, based on the order of Judge Scarborough transferring this matter back to the Circuit Court. (R. Vol. IV pp. 1423-1431.) Of note is that the Petitioners in their motion to dismiss incorrectly purport that the only issue raised by the Respondent on appeal is the issue of jurisdiction of the Master-in-Equity – when in fact the issues raised are not fully developed until the filing of the Initial Brief pursuant to the S.C. Rules of Appellate Practice. The Respondent filed a Return to the motion asserting that the order entered by the Master-in-Equity was entered without jurisdiction due to the fact that pursuant to Rule 205 of the S.C. Rules of Appellate Practice, upon the service of a notice of appeal the appellate court shall have exclusive jurisdiction over the appeal, with the trial court retaining jurisdiction over matters not affected by the appeal. (R. Vol. IV, pp. 1490-1492.) In an order by the Honorable Bruce Williams filed on November 12, 2020 on behalf of the Court of Appeals, Judge Williams denied the Petitioners’ motion to dismiss the appeal citing Rule 205 of the S.C. Rules of Appellate Practice as urged by Respondent in its Return specifically based on the issue of lack of jurisdiction by the Master to take action on the matter pending the appeal. (R. Vol. I, pp. 214-215.) However, the Respondent in its Return noted that given the position of the Petitioners, they would likely be willing to file a consent order voluntarily transferring the matter to the Circuit Court. (R. Vol. IV, pp. 1485-1486.) Respondent’s counsel did not receive any further correspondence from the Petitioners regarding a consent order resolving the appeal and formally and correctly transferring the matter to the Circuit Court. Nevertheless, the Circuit Court continued to hear matters regarding this case following the

entry of the Order of Judge Williams.

On September 17, 2020, the Respondent filed a Response in Opposition to the Petitioners' Motion for Summary Judgment, as detailed above. (R. Vol. IV pp. 1432-1441.) On October 7, 2020, Judge Price issued an order granting summary judgment in favor of Eugene Zurlo and The Beach Company. (R. Vol. I pp. 188-190.) Judge Price also granted the Petitioner SWA's Motion to Supplement/Motion to Dismiss. (R. Vol. I pp. 188-190.) In a supplemental order filed on October 8, 2020, Judge Price granted 1776, LLC's motion for summary judgment, and granted The Beach Company and Beach Fenwick's Motion for Summary Judgment. (R. Vol. I pp. 191-193.) On October 12, 2020, Judge Price issued a more detailed order granting summary judgment in favor of all defendants. (R. Vol. I pp. 194-210.) On October 16, 2020, the Respondent filed a 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 Ruling. (R. Vol. IV pp. 1493-1558.) The Petitioners filed various responses to the Respondent's Motion. On November 6, 2020, Judge Price filed an Order denying the Respondent's October 7, 2020 Motion to Alter or Amend Order. (R. Vol. I pp. 211-213.) Respondent filed a timely notice of appeal of all three orders entered on October 7, October 8, and October 12, 2020 regarding summary judgment, on November 9, 2020. (R. Vol. V pp. 1990-2019.) The parties appeared at the Court of Appeals for oral argument on March 4, 2024. On August 7, 2024, the Court of Appeals issued Opinion No. 6081 reversing the order of reference and the order granting summary judgment and denying the motion to amend. (Opinion of the Court of Appeals). All Petitioners filed Petitions for Rehearing to the Court of Appeals. (Petitions for Rehearing filed by the Joint Petitioners and SWA) The Petitions for Rehearing were denied by the Court of Appeals in an Order dated September 17,

2024. (Order Denying Petitions for Rehearing).

ARGUMENT AND RETURN TO JOINT PETITIONERS

Contrary to the assertions and somewhat dramatic hyperbole of the Petitioners in their Joint Petition, the Opinion of the Court of Appeals does not upend fundamental aspects of property law and set bad precedent. To the contrary – the Appellate Court’s Opinion is consistent with prevailing law, as discussed *infra*. Additionally, the Court of Appeals did not hold that a genuine issue of material fact exists as to whether the Resolution, Assignment and Assignment Contract create an easement as Petitioners state in their Joint Petition. Instead, the Court of Appeals ruled that the character of “the easement” is a genuine issue of material fact. Therefore, the easement exists. The Opinion of the Court of Appeals is well-reasoned and completely consistent with established precedent. The Petitioners’ writ petitions to this Honorable Court are entirely without merit and should be denied by this Honorable Supreme Court.

A. Petitioner’s Argument that So-Called “Supreme Court Precedent Regarding the Sufficiency of Location Descriptions in Easements in order to Create a Valid and Enforceable Easement” Misses the Forest for the Trees.

As an important initial matter, Petitioners, who argue that the Opinion of the Court of Appeals is sufficiently egregious and fundamental as to warrant correction on certiorari, do not assert in their Joint Petition that they are bona-fide purchasers without notice of the easement. Instead, they curiously state, “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”. (Joint Petition p. 15.) Respondent continues to assert that Petitioners all had actual notice of the easement. Therefore, all of Petitioners’ arguments for certiorari review should be viewed in this light.

Respondent claims an easement by virtue of the Resolution, the Contract for Assignment, and the Assignment. Petitioners basically argue that the description of the easement does not sufficiently identify its location. This argument is simply a regurgitation of the same prior argument, which has been thoroughly addressed by Respondent in brief and which the Court of Appeals correctly rejected. The Petitioners assert that the Resolution, Assignment and Assignment Contract specifically fail to identify the location of the easement and erroneously assert that “location” is an explicit requirement in easement law in South Carolina. The Respondent wholly agrees with the Court of Appeals’ Opinion in Footnote # 9 that the Circuit Court had no legal basis to reach the conclusion that the Resolution could not create an easement because it did not include “essential elements” necessary to create a property right.

Furthermore, the case of *Rogers v. River Hills Limited Partnership*, No. 4:09-CV-01540-JMC, 2011 WL 4808207 (D.S.C. Oct. 7, 2011), aff’d, 514 F. App’x 276 (4th Cir. 2013), which is cited by the Petitioners in their Cert Petition (and which appears to be cited for the very first time in this appeal following the issuance of the Opinion by the Court of Appeals), is wholly inapplicable and irrelevant to the case at bar because it is a federal district court order and not binding upon this Court. However, the language cited in *Rogers* is not contrary to the position of Respondents. In *Rogers*, the federal district court had to determine whether the contested easement – purportedly created via a Resolution identified in minutes of a corporate partnership meeting – violated the Statute of Frauds. The district court held that the minutes did not qualify as a sufficient written memorandum to satisfy the Statute of Frauds. The district court cited *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 71, (Ct. App. 2001). In relevant part, *Binkley* states the following: “A description of an easement in a recorded document 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].’ (footnote and citations omitted) (emphasis added). The *Binkley* opinion dealt with a description of an easement in a recorded document. In the instant case, the documents creating the easement were not recorded and Respondent asserted that all Petitioners had actual knowledge of the easement, which the Court of Appeals’ Opinion acknowledges.

Assuming arguendo that there is a strict requirement for language that acts as a guide to the location of the easement in an unrecorded (or recorded) document (which there is not), the specific inclusion of Pitch Fork Road in the Resolution, Assignment and Assignment Contract is clearly “something extrinsic” for reference, which acts as a guide to the location of the easement on the servient estate. (See R. pp. 1806-1807; p. 1811; p. 1818-1819). Furthermore, Petitioners ignore the fact that the Affidavit of Michel F. LaPlante describes the intended location of the easement over the servient estate to connect with Pitchfork Road once it was completed. (R. pp. 1946 – 1948). Furthermore, a plat recorded after the creation of the Resolution, Assignment and Assignment Contract, shows the route of “Northern Pitchfork Road” across the servient estate. (R. p. 1078.)

B. The Opinion of the Court of Appeals Does Not Directly Conflict with Supreme Court Precedent

Contrary to the assertions of the Petitioners, the Resolution is simply not an unenforceable agreement to agree, which is addressed by the Respondent in reply brief and which assertion was rejected by the Court of Appeals in its Opinion, and which does not directly conflict with Supreme Court precedent. Furthermore, Petitioners ignore the fact that the membership interest transfer of Maybank (which occurred) was specifically conditioned on the grant of the easement. Respondent claims an easement by virtue of the Resolution, Contract for Assignment, and Assignment. The Beach Entities’ argument that these documents only amount to a mere agreement to agree is

without merit.

In *Ten Woodruff Oaks , LLC v. Point Development, LLC*, 385 S.C. 174, 180 683 S.E.2d 510 (Ct.App. 2009), which is somewhat similar to the facts of this case, the Court of Appeals stated:

[Appellant] “**contends that the letter agreement that CICC and TWO signed was a best a contract evidencing the parties’ intent to create an easement upon the preparation and recording of various legal documents.** [Appellant] further asserts CICC and TWO failed to follow through on numerous issues that were either required or contemplated by the letter agreement, such as the preparation of reciprocal easement agreements and a specific description of the easement terms. **We disagree.**

‘**As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient.**’ 25 Am.Jur.2d Easements and Licenses § 15, at 512 (2004). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct.App.1994). "If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004).

We recognize the letter agreement has language suggesting the agreement to establish an easement could be executory in nature; however, contrary to what [Appellant] argues, this language does not indicate the easement CICC intended to grant to TWO was contingent on the completion of the various tasks enumerated in the letter. As a practical matter, enjoyment of the interest would require physical preparation of the grounds subject to the easement, and legal work would have been necessary to ensure that the easement remained enforceable as to subsequent title holders of the estates involved.

(footnotes omitted) (emphasis added).

Furthermore, the Court of Appeals stated in *Smith*:

Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so

as to carry out that intention. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); 23 Am.Jur.2d Easements and Licenses § 23 (1966) (**if the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court**). (emphasis added).

After the Court of Appeals in *Smith* found that the agreement established an easement, the Court of Appeals ruled that the easement was to be located in a location as is reasonably necessary for the full enjoyment of the plaintiffs' property. The Court of Appeals stated, "The subject **unlocated** easement must be interpreted, however, in light of good faith, reasonableness **and what was necessarily the intent of the parties to the 1955 agreement.**" *Id.* at 336 (emphasis added). Accordingly, the Court of Appeals in *Smith* remanded the case for a determination of the number of access points and routes to include their width. *Id.* at 337.

Moreover, in *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971), this Honorable Court ruled that an instrument creating an easement was an easement in gross for commercial purposes even though it was not apparent on its face. This Court found that the wording of the instrument "leaves the exact character of the easement in doubt", and stated, "[w]e **are therefore presented with a situation where it is impossible to determine the nature or character of the easement from the language used in the reservation. Under such circumstances, parole evidence was properly considered in determining the character of the easement reserved.**" *Id.* (emphasis added). In reaching its ruling this Court stated, "The fallacy in respondent's argument [that the character of the easement should be determined solely from the wording of the instrument and parole evidence also was inadmissible] lies in the fact that...the wording of the present reservation leaves the exact character of the easement in doubt." *Id.* at 447. Thus, this Court ruled that parole evidence was properly admitted to determine the character of the easement. Therefore, parole evidence is necessary and admissible to determine the intention of

the parties relative to the nature or character, extent and location of the easement, and the intention of the parties relative to the reference to “that certain roadway known as Pitch Fork Road”.

In *West v. Newberry Electric Cooperative*, 357 S.C. 537 (S.C. Ct. App. 2004), the Court of Appeals found that a 1955 written easement agreement was a restrictive covenant despite the fact that the agreement was unrecorded. In so finding, the Court of Appeals stated:

The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, **it does envision the future of the land** and thus applies to the Wests. *See Marathon*, 325 S.C. at 604, 483 S.E.2d at 765 (explaining that a "restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land") (citation omitted).

Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. **The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated.** The covenants were obviously intended to touch and concern the subject property.

Id. at 542-3.

Just as the exact location of the easement was not described in *West* and was found to be enforceable as a restrictive covenant, the exact location of the easement is not described in the Resolution, Contract for Assignment and Assignment. *Id.*

The Resolution, Contract for Assignment and Assignment create an easement and do not amount to a mere agreement to agree based upon their very language. Parole evidence is necessary to determine the intention of the parties relative to the nature or character, extent and specific

location of the easement over the servient estate, and the intention of the parties relative to the reference to the “Pitchfork Road” language in these documents.

C. The Opinion of the Court of Appeals Will Not Result in Uncertainty in Future South Carolina Foreclosures.

Contrary to the assertion of the Petitioners, the Foreclosure Order did not extinguish the easement, which is addressed by the Respondent in brief and which assertion was rejected by the Court of Appeals in its Opinion. It is important to restate that Petitioners do not assert that they are bona-fide purchasers without notice of the easement. Respondent continues to assert that Petitioners all had actual notice of the easement. Therefore, all of Petitioners’ arguments should be viewed in this light.

The Respondent incorporates the arguments in brief in Return to the Petitioners. Further, the Petitioners rely heavily on case law from other states, which cases are not binding upon this Court. Petitioners’ arguments effectively downplay the importance of Michel F. Laplante (herein “Laplante”) being expressly severed from the foreclosure claim as set forth on the second page of the foreclosure judgment, which states in relevant part: “Defendant Michel F. Laplante (severed from the foreclosure claim)”. (R. Vol. I pp. 2.) These arguments also downplay the very important jurisdictional issue that the Respondent and the other members of the Laplante family were neither named as parties nor served with process in the foreclosure case. Thus, Laplante’s rights and interests in the subject property survived the foreclosure because he was no longer a party to the foreclosure action and effectively cut off from any consequence of the foreclosure, which also means that his knowledge of the foreclosure could not be imputed to the Respondent presuming *arguendo* it could as Petitioners argue (it could not). Furthermore, the Master-in-Equity in the foreclosure case never had personal jurisdiction over the Respondent or the other members of the

Laplante family, and as a result, their rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007) (“A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice.”) In *Adams*, the Court of Appeals agreed in part that the circuit court could not bind Adams to a foreclosure action to which he was not a party. However, because the circuit court properly exercised personal jurisdiction over Adams in a subsequent action to add him as a party to the foreclosure action, there was no reversible error. *Id.* at 586-7. Respondent and the other members of the Laplante family were never joined as parties to the foreclosure in any action.

A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). (“The purpose of the summons is to acquire jurisdiction of the person of the defendant. . .”). Thus, the foreclosure judgment is simply void as applied against the rights of Respondent, Laplante and the other members of the Laplante family. Therefore, the easement was not impacted by the foreclosure. Due process is fundamental. Due process will not result in uncertainty in future South Carolina foreclosures. Furthermore, reliance by the Petitioners on S.C. Code Ann. § 30-7-20 misplaced as the statute concerns the modification, subordination, or extension of a lien, and which is not applicable here. The documents creating the easement (the Resolution, Contract for Assignment and Assignment) clearly do not concern the modification, subordination or extension of a lien. Moreover, this statute is obviously not a substitute for compliance with due process.

D. A Novel Question Does Not Exist Relative to so-called “Standard Form Language” in a Foreclosure Order

Boiled down, Petitioners’ meritless argument here is that the foreclosure order should not mean what it expressly states, to wit: “**The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.**” (emphasis added). (R. Vol. I pp. 14.) Further, this Court should disregard case law from Alabama as it is not binding precedent nor applicable in South Carolina. It is important to note that Petitioners do not cite a single South Carolina case for this specific argument. Lastly, a person or entity cannot be bound to an order without due process of law as discussed by the Respondent in brief. The Respondent incorporates the arguments in brief in Return to the Petitioners.

E. Petitioners Erroneously Assert that the Respondent Should Be Estopped for Failing to Raise the Purported Easement’s Existence in the Foreclosure Action, even as the Respondent was Not a Party to the Foreclosure Action.

The Petitioners erroneously assert that because Michel Laplante was in the first instance a party to the foreclosure action at issue in this case, the Respondent should be estopped from raising the existence of the easement. As the Opinion of the Court of Appeals provides, the Respondent was never a party to the foreclosure action and was not provided due process. Furthermore, Laplante was not the managing member of PCA at the time of the foreclosure judgment and sale, a fact which Petitioners curiously do not mention. (R. Vol. V pp. 1944.) Petitioners’ argument here effectively ignores the fact that Laplante was expressly severed from the foreclosure claim as set forth on the second page of the foreclosure judgment, which states in relevant part: “Defendant Michel F. Laplante (severed from the foreclosure claim)”. (R. Vol. I pp. 2.) The Respondent has also addressed this issue in brief and incorporates such in Return to Petitioners. Furthermore, the Petitioners cite to cases from Illinois and Maine, which are not

binding precedent.

F. Petitioners Erroneously Assert the Easement Cannot Be an Easement Appurtenant

The Petitioners erroneously assert that the easement cannot be an easement appurtenant, which has been addressed by the Respondent in brief and also rejected by the Court of Appeals. The Respondent incorporates the legal and factual arguments in this Return and urge this Court to deny the petition of the Petitioners. Furthermore, in Footnote # 14 of the Joint Petition, Petitioners incorrectly represent that “the record contains no evidence Respondent was ever transferred any right to this purported easement.” However, the Affidavit of Mitch LaPlante states in Paragraph # 35, “Maybank was assigned rights to the easement.” (R. Vol. 5 pp. 1949).

ARGUMENT AND RETURN TO SEAMON, WHITESIDE & ASSOCIATES, INC.

Petitioner SWA’s argument for certiorari review is meritless. The Opinion of the Court of Appeals is correct. “Maybank did not abandon any argument related to the motion to dismiss because the circuit court’s order, which was appealed, granted the motions for summary judgment, including SWA’s, and effectively denied SWA’s motion to dismiss.” *Maybank 2754, LLC v. Zurlo*, 444 S.C. 47, 906 S.E.2d 94 n. 11 (Ct. App. 2024).

I. The Court of Appeals Did Not Overlook nor Misapprehend SWA’s Appeal As to the Civil Conspiracy Claim.

In Return to SWA, the Respondent adopts and incorporates all previous arguments of law and fact in the Respondent’s briefs. SWA argues that Respondent has failed to raise grounds to reverse its Rule 12(b)(6) motion to dismiss and therefore has abandoned the issue because Respondent has not addressed in its appeal SWA’s grounds for its motion to dismiss or the courts grounds for granting the motion. However, this argument is without merit for the reasons

explained below.

The Opinion of the Court of Appeals reverses the trial court's denial of the Respondent's Motion to Amend its Complaint. The Respondent has been given leave to amend its complaint, which ruling has not been challenged in the Petitioner's Petition for Rehearing nor the Petition for Writ of Certiorari. Therefore, the Opinion of the Court of Appeals on this point serves to moot the arguments of the Petitioner regarding their motion to dismiss pursuant to Rule 12(b)(6), SCRCPP.

SWA filed its motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCPP, on February 20, 2020. (R. Vol. II pp. 581-591.) More than six months later, on August 26, 2020, SWA filed its "Supplement to Motion to Dismiss and/or Motion for Summary Judgment", which sought dismissal with prejudice under Rule 12(b)(6), SCRCPP, or in the alternative, pursuant to Rule 56, SCRCPP, by incorporating by reference the arguments and analyses of the pending motions for summary judgment of some of the other Defendants. (R. Vol. III pp. 1347-1348.)

Subsequently, on October 7, 2020, the court entered a Form 4 order, which stated in relevant part, "Defendant Seamon Whiteside and Associates Inc.'s Motion to Supplement/Motion to Dismiss is GRANTED", without stating any grounds. (R. Vol. I pp. 188-190.) The next day, on October 8, 2020, the court entered another Form 4 order, which supplemented the October 7, 2020 Form 4 order by adding that the summary judgment motions three other defendants were granted. (R. Vol. I pp. 191-193.) The Form 4 orders entered on October 7, 2020, and October 8, 2020, were the result of a September 24, 2020 hearing. Subsequently, on October 12, 2020, the court entered an Order Granting All Defendants Summary Judgment. (R. Vol. I pp. 194-210.) Of note is that the October 12, 2020 order references the September 24, 2020 hearing and specifically states, "No genuine issue of material fact exists to prolong this litigation; **therefore, it is Ordered that the Defendants' Motions for Summary Judgment are hereby granted**, and this matter is

dismissed in its entirety.” (R. Vol. I p. 194; p. 209.) (emphasis added). Therefore, the court effectively denied SWA’s Rule 12(b)(6) motion to dismiss by granting summary judgment, as provided by the Opinion of the Court of Appeals.

Furthermore, Respondent did address the issues raised in SWA’s Rule 12(b)(6) motion to dismiss/motion for summary judgment in its initial brief. Respondent asserts that a material issue of fact exists as to “Zurlo and/or all the Defendants being part of a deceitful scheme and conspiracy to develop the subject property without affording any provisions or reservations for the easement with the specific intent to harm the Respondent, which caused the Respondent damages, including special damages.” (Brief of Appellant, p. 19).

Moreover, the entirety of SWA’s arguments relative to any pleading deficiencies (there are no such deficiencies) of the civil conspiracy claim are moot because the Opinion of the Court of Appeals reversed the trial court’s denial of Respondent’s motion to amend its complaint. *See Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S. Ct. 227, 228, 230, 9 L. Ed. 2d 222, 224, 226 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave to amend the complaint "should, as the rules require, be 'freely given'" (quoting Rule 15(a), Fed. R. Civ. P.)); *Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (holding "Dockside should have been given leave to amend its complaint" before it was finally dismissed pursuant to Rule 12(b), SCRCF (citing *Foman*, 371 U.S. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226). Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005).

A. SWA Did Not Object to the Circuit Court Referring the Case to the Master

SWA did not object to the circuit court referring the case to the master and even sought for the master to consider its then pending motion. (R. Vol. IV pp. 1683.) Therefore, SWA's argument that Court of Appeals' holding that the circuit court erred in referring the matter to the master has no bearing on SWA is completely meritless.

B. Respondent Did Not Abandon Any Argument Related to SWA's Motion to Dismiss

SWA argues that Respondent abandoned any argument related to SWA's motion to dismiss. To the contrary – Respondent did not abandon any argument related to SWA's motion to dismiss, as discussed *supra*.

i., ii., iii., Assuming Arguendo There Were Pleading Deficiencies Relative to the Civil Conspiracy Claim (There Were None), Such Deficiencies Are Moot

The remainder of SWA's arguments set forth in subsections i., ii., and iii., to support certiorari review center around alleged pleading deficiencies (there were none) relative to Respondent's civil conspiracy claim. Such arguments are moot and of no consequence because the Appellate Court reversed the trial court's denial of Respondent's motion to amend its complaint as discussed *supra*.

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CONCLUSION

WHEREFORE, the Respondent prays that this Honorable Court deny the Petitions for Writ of Certiorari filed by all Petitioners in this matter.

Respectfully Submitted,

s/Scarlet B. Moore

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